INDEX

CITATIONS

Cases—Continued

Cases—Continued

Statutes, Reorganization Plans and Rule:

Statutes, Reorganization Plans and Rule—Continued

Miscellaneous:

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 20

FEDERAL TRADE COMMISSION, PETITIONER

v.

FLOTILL PRODUCTS, INC., AND MRS. MEYER L. LEWIS, ALBERT S. HEISER, AND ARTHUR H. HEISER, AS OFFICERS OF SAID CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 45-58) as amended *per curiam* on rehearing *en banc* (R. 61-62) is reported at 358 F. 2d 224. The opinions of the Federal Trade Commission (R. 4-42) are reported at 1963-1965 CCH Trade Regulation Reporter Transfer Binder ¶ 16,970.

JURISDICTION

The final decree of the court of appeals (R. 59) was entered on April 1, 1966. On June 20, 1966, the court granted the Commission's timely petition for rehearing *en banc* and, after such hearing, the court on August 15, 1966, entered an order modifying the earlier opinion and concurring therein as modified (R. 61-62). The petition for a writ of certiorari was filed on October 12, 1966, and was granted on April 17, 1967 (R. 62; 386 U.S. 1003). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a cease-and-desist order of the Federal Trade Commission is invalid because concurred in by only two of the three members of the agency who participated in the decision.

STATUTE, REORGANIZATION PLAN AND RULE INVOLVED

Section 1 of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 41, provides in pertinent part:

> That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party * * *. A vacancy in the commission shall not

impair the right of the remaining commissioners to exercise all the powers of the commission.

Section 6 of the Act, 38 Stat. 721, 15 U.S.C. 46, provides in pertinent part:

The commission shall also have power—

* * * *

(g) * * * to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title.

Section 1 of Reorganization Plan No. 4 of 1961, 75 Stat. 837, note following 15 U.S.C. 41, provides in pertinent part:

Section 1. Authority to delegate. (a) In addition to its existing authority, the Federal Trade Commission, hereinafter referred to as the "Commission", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided, however*, That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended [Section 556(b) of Title 5].

Section 6 of the Statement of Organization of the Federal Trade Commission, effective July 1, 1967, 32 Fed. Reg. 8442, provides: [1]

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[1] This Section supersedes, but is identical to, former Rule 1.7 of the Commission's Procedures and Rules of Practice, 16

A majority of the members of the Commission constitute a quorum for the transaction of business.

STATEMENT

Respondent Flotill Products, Inc. ("Flotill") is a processor, canner, and seller of fruits and vegetables. The Federal Trade Commission issued a complaint against Flotill and its three officer-stockholders (who are the other respondents), charging violations of the Robinson-Patman Act. After full administrative proceedings, the Commission held that Flotill had made payments in lieu of brokerage in violation of Section 2(c) of the Act, 15 U.S.C. 13(c), and had granted discriminatory promotional allowances in violation of Section 2(d) of the Act, 15 U.S.C. 13(d). The Commission issued a cease-and-desist order against Flotill and its three officer-stockholders. Only three members of the Commission participated in the decision (R. 3).[2] All three concurred in the finding that Flotill had violated Section 2(d), but only two of the three joined in the ruling on the Section 2(c) violation (R. 26).

The Court of Appeals for the Ninth Circuit enforced that portion of the order concurred in by the

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C.F.R. 1.7 (Cum. Supp., Jan. 1, 1966). To avoid misunderstanding, in this brief reference will continue to be to Rule 1.7, as it was cited in the proceedings below.

[2] Five commissioners heard oral argument in the case, but two had retired before the Commission issued its decision. During the interim, Commissioner Reilly was appointed to the agency, but he declined to participate in the case (R. 3).

three participating Commissioners but refused to enforce the portion in which only two Commissioners concurred (R. 48-52). The three-judge panel divided on this point. The majority ruled that "absent statutory authority or instruction to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission" (R. 48); and it remanded the case on this issue "for further hearings to determine whether a majority of the Commission desires to enter such an order" (R. 60).[3] One judge dissented on the ground that Congress had never disapproved of the Commission's five decade old rule and practice of taking official action by vote of a majority of a quorum (R. 58). The full court granted the Commission's petition for rehearing *en banc* on the issue and sustained the panel decision five-to-four (R. 61-62).

SUMMARY OF ARGUMENT

Precedent, tradition, and policy support the Federal Trade Commission's long standing rule of practice that a majority of the membership constitutes a quorum for the transaction of business. The Commission's power, acting under this rule, to take valid

[3] The Commission's order was directed against Flotill and against three officers of the company (who owned and controlled it), both individually and in their representative capacities (R. 1-3). The court of appeals held that the Commission had no basis for entering an order against the officers individually, and deleted from the order the reference to them in that capacity (R. 59). We do not here challenge the modification of the order.

action by vote of a majority of the quorum flows as a corollary from the authority to function without the participation of all five authorized Commissioners. Although the Federal Trade Commission Act does not contain an explicit quorum provision, it does provide that the Commission's power to transact business is not to be impaired by vacancy. Section 6(g) of the Act empowers the Commission to make rules and regulations for the purpose of carrying out the provisions of the Act and effectuating its statutory responsibilities. The Commission's quorum rule, adopted pursuant to this authority, promotes the practical functioning of the Commission, and is neither arbitrary nor extraordinary. It is merely an adoption of the traditional common law rule, applicable to government bodies and corporations—and even to Congress itself—that, absent specific statutory provisions to the contrary, a simple majority of an institutional body constitutes a quorum which can transact business and bind the body by the concurrence of a majority of those participating.

The Commission has adhered consistently to its quorum rule since the earliest days of its existence. Despite the opportunity to do so, Congress has never expressed any disapproval of the Commission's practice under the rule. Such tacit approval amounts to implied ratification of that practice. The consistent congressional course of expressly conferring on newer regulatory agencies the power to act by quorum also demonstrates the compatibility of the Commission's practice with congressional objectives. Congressional recognition of the desirability of this practice is fur-

ther illustrated by its acceptance of the President's Reorganization Plan No. 4 of 1961, which explicitly permits the Commission to delegate its functions to a panel or even to a single commissioner.

If the Commission's quorum rule is valid, it requires no extended discussion to prove that a majority of the quorum, even though less than a majority of the total membership, may bind the Commission. Except for the decision now under review, an unbroken line of judicial authority upholds the validity of orders issued by a majority of a quorum of the Commission, as well as other federal agencies. "Any other method of procedure would be awkward, if not impracticable." [4] Even the court below conceded that this would be a "reasonable construction" of a quorum rule, if the Commission has the authority to adopt such a rule (R. 50).

The authority to act through majority vote of a quorum is important to the Commission's effective performance of its functions. Whenever, by reason of vacancies, illness, or disqualification of individual members as to specific cases, the Commission can assemble only three members, it would be seriously impeded if it could take valid action only by a unanimous vote. It could not confidently proceed to consider any matter with only three members available lest a split vote necessitate costly and time-consuming reargument at some future time before the full Commission. The Commission's practice is supported by substantial

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[4] *Frischer & Co.* v. *Elting*, 60 F. 2d 711, 714-715 (C.A. 2), certiorari denied, 287 U.S. 649.

considerations of administrative efficiency, and no policy consideration has been offered which warrants invalidating it.

ARGUMENT

In refusing to enforce a cease-and-desist order concurred in by less than a majority of the membership of the Federal Trade Commission, the court below eviscerated the Commission's long-standing rule of practice—which the agency has had in similar form for half a century—that "a majority of the members of the Commission shall constitute a quorum for the transaction of business." [5] The court reached this result by indulging in the anomalous presumption that, absent express statutory authorization, the Commission lacked the power to adopt this rule, when in fact, quite to the contrary, the presumption is that an administrative agency does have such power. We shall show not only that Congress has plainly manifested its intention that the Commission can conduct its business under the quorum rule, but also that clear precedent and important policy considerations compel the conclusion that the proper presumption where the enabling legislation is silent is that the agency may act through a quorum and bind itself by vote of the majority of that quorum.

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[5] 16 C.F.R. 1.7; see, *e.g.*, Annual Reports of the Federal Trade Commision for 1936, p. 151; for 1937, p. 142; for 1948, p. 95; for 1950, p. 109; for 1951, p. 118. The rule was earlier stated that "Three members of the Commission shall constitute a quorum for the transaction of business." Annual Reports of the Federal Trade Commission for 1916, p. 49; for 1917, p. 43; for 1920, p. 87.

I. The Commission Has Authority to Take Action by Majority of a Quorum.

A. *The Quorum Rule is the traditional mechanism for institutional operation.*

In establishing the Federal Trade Commission in 1914, Congress did not define in minute detail the procedures the Commission is to follow in conducting its business. Instead, Congress left it to the Commission itself, under Section 6(g) of the Federal Trade Commission Act, 15 U.S.C. 46(g), to "make rules and regulations for the purpose of carrying out the provisions" of the statute and dispatching the Commission's operations. The Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 41 *et seq.*, does not treat the question of what constitutes a quorum for the transaction of the Commission's business.[6] Congress did address itself to the power of the Commission to act with less than its full membership when it provided in Section 1 (15 U.S.C. 41) that "a va-

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[6] A reading of the extensive legislative history attendant to the passage of the Act fails to reveal that the question was even considered. However, it is a familiar presumption of statutory construction that the legislature knew the existing common law at the time of enactment of a statute, and that it adopted that common law in the absence of an expression of contrary intent. See 3 Sutherland, *Statutory Construction* § 5301 (1943); Crawford, *The Construction of Statutes* § 228 (1940). At the time of enactment of the Federal Trade Commission Act, the general rule of the common law was that a simple majority of the members of a body constitutes a quorum, and that a majority of the quorum can act for the body. See note 9, *infra*. Thus, the very fact that the Act is silent on the quorum rule supports the authority of the Commission to adopt it as a rule of practice.

cancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the Commission." [7]

But Congress plainly did not intend that the language of the Act would provide all the details of the practice and procedure of the Commission. Rather, as the customary grant of rule making power under Section 6(g) indicates, Congress contemplated that these decisions should be made by the Commission. Significantly, this authority explicitly extends to carrying out Section 1 of the Act, 15 U.S.C. 41, which establishes the Commission as a five member agency and

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[7] The court below noted that this provision was phrased in the singular (R. 50, n. 2), and suggested that this proviso might mean that only a single vacancy may occur without impairing the Commission's ability to function. By its disposition of this case, the court below evidently did not rely on such a reading of this provision. The court affirmed the Commission's order with respect to the Section 2(d) violation because it was concurred in by three members, a majority of the full Commission. Congress itself recognizes that there is no inconsistency between providing that "a vacancy" will not affect the ability of an agency to function and permitting the agency to operate by a bare majority quorum, for in subsequently creating other agencies it has explicitly recognized both principles. See 29 U.S.C. 153(b) (NLRB); § 102, 75 Stat. 840 (Reorganization Plan No. 7 of 1961, note following 46 U.S.C. 1111) (FMC); 16 U.S.C. 792 (FPC) ("no vacancy"); 47 U.S.C. 154(c) and (h) (FCC) ("no vacancy").

The court did not consider 1 U.S.C. 1, which provides that in determining the meaning of an Act of Congress, "words importing the singular include and apply to several persons, parties, or things." Under this authority, if the more sensible plural construction is given to the vacancy provision, authority for the Commission's quorum rule may be drawn directly from the enabling legislation.

provides that a vacancy "shall not impair the right of the remaining commissioners to exercise all the powers of the commission." The courts have repeatedly held that the rule-making power conferred by Section 6(g) enables the Commission to adopt any rule not inconsistent with the law, and have given the force of law to rules so adopted. See, *e.g.*, *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342, 345 (C.A.D.C.); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351, 352 (C.A. 7); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104, 106 (C.A. 5); *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362, 363 (C.A. D.C.). This Court has recognized the broad rule-making authority of federal agencies under similar statutory provisions. See *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 289-90. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, at 143, this Court stated that administrative bodies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." See also *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 321-322.

The court below sought to distinguish this line of authority by holding that the broad power of administrative bodies to determine their own procedural rules applies only to matters in which the agency's expertise in regulating a specific industry is at issue, and not to an agency's interpretation of its own enabling legislation (R. 51). Neither the cases nor any cogent policy considerations justify such a narrow

distinction. An agency's practical construction of the breadth of its own organic statute, especially where as here that interpretation appears in the unbroken tradition of half a century, is entitled to more deference than the court below accorded it. Concededly, an agency may not in the guise of formulating procedures adopt rules that are arbitrary or usurp unconferred jurisdiction. But the quorum rule adopted by the Federal Trade Commission is nothing more than a codification of the common law principle that, in the absence of controlling statutory provisions, a simple majority of the members of a body constitutes a quorum which can transact business and bind the body.[8] Indeed, as Congress was certainly aware when it created the Commission, this Court has held that Congress itself may enact valid legislation by majority vote of a quorum, *United States* v. *Ballin*, 144 U.S. 1, and this Court has since interpreted the Constitutional requirement of a two-thirds vote of each House of Congress to pass a bill over Presidential veto to mean two-thirds of a quorum of each House, *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U.S. 276, 280. This common law rule was well established by the time

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[8] *Cooley* v. *O'Connor*, 12 Wall. 391, 398; *Brown* v. *District of Columbia*, 127 U.S. 579, 586; *Kaiser* v. *Real Estate Commission of District of Columbia*, 155 A. 2d 715, 717 (Mun. Ct. App. D.C.), affirmed, 280 F. 2d 642 (C.A. D.C.); *Gunnip* v. *Lautenklos*, 33 Del. Ch. 415, 94 A. 2d 712; *E. C. Olsen Co.* v. *State Tax Comm'n*, 109 Utah 563, 168 P. 2d 324; *Zoning Comm'n.* v. *Ogden*, 307 Ky. 362, 210 S.W. 2d 771; *Adkins* v. *Citizens' Board of City of Huntington*, 112 W. Va. 171, 163 S.E. 853; 854; *Codman* v. *Crocker*, 203 Mass. 146, 89 N.E. 177; *Martin* v. *Lemon*, 26 Conn. 192, 193; *Barnert* v. *City of Paterson*, 48 N.J.L. 395, 6 Atl. 15, 17-18.

Congress created the Federal Trade Commission [9] and it seems eminently reasonable to believe that if Congress were dissatisfied with the traditional understanding of the powers of an institutional body, it would have negated this presumption by some clear language.

Undeviating authority recognizes that the presumption that a majority constitutes a quorum lawfully capable of acting in the name of the institution applies to all types of governmental bodies [10] and to incorporated associations as well. It has long been settled in corporate law that a majority of the board of directors may constitute a quorum for the transaction of the corporation's business, 2 Fletcher, *Cyclopedia Corporations* § 419; 2 Thompson, *Corporations* § 1250 (3rd ed.).

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[9] See, *e.g.*, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 547; *Brown* v. *District of Columbia*, 127 U.S. 579, 586; *State ex. rel Green* v. *Edmondson*, 23 Ohio Dec. 85, 96; *Floyd* v. *Quinn*, 24 R.I. 147, 163, 52 Atl. 880, 886.

[10] *E.g.*, *Tobin* v. *Ramey*, 206 F. 2d 505, 507 (C.A. 5); *Alltmont* v. *United States*, 177 F. 2d 971, 973 (C.A. 3), certiorari denied, 339 U.S. 967; *Davidson* v. *State*, 221 N.E. 2d 814 (S.C. Ind.); *Mountain States Tel. & Tel. Co.* v. *People ex rel.*, 68 Colo. 487, 498-500, 190 Pac. 513 (courts); *Rollins* v. *Halverson*, 257 Ia. 399, 407, 132 N.W. 2d 465, 470; *Bray* v. *Barry*, 91 R.I. 34, 41-42, 160 A. 2d 577, 581 (school boards); *State ex. rel. Hill* v. *Ponder*, 221 N.C. 58, 62, 19 S.E. 2d 5, 8 (tax commission); *Herring* v. *City of Mexia*, 290 S.W. 792, 794 (Tex. Civ. App.) (city commission); *Borough of Oakland* v. *Board of Conservation & Development*, 98 N.J.L. 806, 816, 122 Atl. 311 (conservation board); cf. *Democratic-Farmer-Labor State Central Comm.* v. *Holm*, 227 Minn. 52, 55-56, 33 N.W. 2d 831, 833 (political convention).

In this context, we submit that the rule-making authority conferred by Section 6(g) comprehends the adoption by the Commission of a quorum rule so consistent with universal precedent and the common law. But, as the following subsections of this brief will demonstrate, it is not necessary to rely solely on an assumption of Congressional awareness of the presumptive rules governing institutional operation, since there is ample independent evidence of Congressional approval of the Federal Trade Commission's quorum rule.

B. *Congress has indicated its approval of the Commission's Quorum Rule.*

Since its inception more than fifty years ago, the Federal Trade Commission has operated under its rule of practice that a majority of its membership constitutes a quorum for the transaction of its business. Its adherence to this rule has been consistent and has received express judicial sanction. See *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A.D.C.), certiorari denied, 353 U.S. 917 (Commission decision by unanimous vote of three members participating);[11] *Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F. 2d 599 (C.A. 6), certiorari denied, 382 U.S. 939; *LaPeyre* v. *Federal Trade Commission*, 366 F.

[11] In *Drath*, the court of appeals rejected contentions that except where a vacancy exists, all five commissioners have to participate for Commission action to be effective, and that a bare quorum suffices only for administrative and not for adjudicative functions. The court held that the time honored rule of the Commission is a "proper one," "in accord with the general rule." 239 F. 2d at 454.

2d 117 (C.A. 5) (Commission decisions by two-to-one votes).[12] In this situation Congress cannot be presumed to be ignorant of the Commission's rule or its practice, yet it has never expressed any disapproval of the rule or taken any step to curb the Commission's reliance upon it, even though there was an opportunity to do so during the administrative reorganization in 1961. Against this background, Congressional silence amounts to implicit approval of the quorum rule.

The substantial growth of federal administrative law since the enactment of the Federal Trade Commission Act in 1914 has afforded Congress many opportunities to enact legislation creating and empowering administrative agencies. Consistently these statutes have expressly provided for agency action by quorum.[13] Of course, it might be argued that the express authority conferred on certain agencies implies a denial of such authority to an agency whose enabling statute is silent. Such an argument here, however, would fail to take into account the historical context of the issue before the Court. The Federal Trade Commission was one of the first federal admin-

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[12] The court below refused to follow the square holding of the Sixth Circuit in *Atlantic Refining*. But the Fifth Circuit in *LaPeyre* has subsequently followed *Drath* and *Atlantic Refining* in preference to the decision below.

[13] See 16 U.S.C. 792 (Federal Power Commission); 49 U.S.C. 17(3) (Interstate Commerce Commission); 19 U.S.C. 1330(c) (United States Tariff Commission); 29 U.S.C. 153 (b) (National Labor Relations Board); 47 U.S.C. 154(h) (Federal Communications Commission); 49 U.S.C. 1321(c) (Civil Aeronautics Board); 42 U.S.C. 2031 (Atomic Energy Commission); 50 U.S.C. App. 1217(b) (Renegotiation Board).

istrative agencies to be created by Congress. In drafting, considering, and enacting legislation defining the powers of subsequent agencies, Congress has had the benefit of the experience and practice of the Federal Trade Commission, including its long standing quorum rule. The reasonable presumption is that Congress expressly granted to succeeding agencies a power it recognized it had impliedly granted to the Federal Trade Commission, and which had been asserted and exercised to the satisfaction of Congress under the Commission rule. A contrary presumption is not tenable, especially in the absence of any indication that Congress intended to authorize greater procedural flexibility to the later agencies.

An example of evident congressional approval of the Commission's quorum rule occurred in 1934, when Congress transferred from the Federal Trade Commission to the Securities and Exchange Commission the administration of the Securities Act of 1933. See 48 Stat. 908. The transfer was authorized to take place sixty days after a majority of the five members of the new commission had qualified and taken office. No provision in the statute imposed upon the new agency a requirement that the three commissioners must act unanimously as to the transferred matters, and the Securities and Exchange Commission has recognized from its earliest days, with judicial approval, that even in the absence of a statutory reference to a quorum, it may act by a majority vote of a quorum.[14] It is hardly conceivable that Congress

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[14] See *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 798, 801 (C.A.D.C.).

could have intended to confer upon a new and untried agency a power to act by less than a majority of its members in performing functions formerly under the jurisdiction of an established agency to which it had denied similar power. Rather, the more compelling conclusion is that Congress merely gave to the Securities and Exchange Commission the right to do what the Federal Trade Commission had been properly doing for twenty years, with the full knowledge and approval of Congress.

A further indication of implied congressional approval of the Commission's long standing quorum rule is to be found in its acceptance of Reorganization Plan No. 4 of 1961, submitted to Congress in May of that year by President Kennedy. The Plan provides that the Commission may delegate any of its functions, "including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business or matter," to a division of the Commission or to an individual commissioner.[15] Both the Senate, 107 Cong. Rec. 11740 (1961), and the House, 107 Cong. Rec. 10855 (1961), rejected resolutions to disapprove the Plan, and it became effective. This action evidences congressional

[15] The Reorganization Plan provides for a "discretionary right to review" any action taken under such delegated authority. Such review may be made on the initiative of the Commission or petition of a party or intervenor in the action, by vote of "a majority of the Commission less one member thereof." (Section 1(b).) However, should review not be sought, or the "right to exercise such discretionary review be declined," the action "shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Commission." (Section 1(c).)

intention to permit the Commission to issue binding cease-and-desist orders by less than a majority of the full membership. The acceptance of this Plan furnishes strong support by implication for the traditional quorum rule long followed by the Commission.[16]

C. *A majority of a quorum can control.*

If, as we have shown, the Commission may adopt a valid rule providing for it to act through a quorum of a majority of its members, then it requires no extended discussion to prove that a majority of the quorum, even though less than a majority of the total membership, may bind the Commission.

In fact, the court below seems to have conceded this. The opinion recites the reasonableness of construing a rule authorizing an agency to act by a quorum of less than the full membership as permitting a majority of the quorum to control. But, the court of appeals said, that presupposed the validity of the quorum rule itself (R. 50). Thus, the result reached below is internally contradictory and self-defeating, for at one and the same time the court denied the Commission the power to adopt a quorum rule and yet enforced the portion of the order in which only three commissioners participated, albeit unanimously. If the Commission may take valid agency

[16] The Commission did not purport to act in this case under the authority of Reorganization Plan No. 4 of 1961. All that is contended here is that the Plan is entirely consistent with the Commission's quorum rule; its adoption by Congress authorizes the Commission to function in even smaller panels than the quorum rule has provided for.

action by the concurrence of a three-man quorum, as the court below agreed it may, then there is no conceivable reason why the Commission may not have a rule that expresses its ability to act by a quorum. Nor has the court of appeals expressed any significant factors that countervail against what it conceded would be a "reasonable construction of such a rule * * * [*i.e.*] that a majority of the quorum would be sufficient to render a decision." (R. 50). Settled principles of judicial review of administrative action require that a reviewing court defer to an agency's "reasonable construction" of its own valid rules.

This result is particularly appropriate here, since this construction is not merely reasonably permissible, but accords with the established principle that where a quorum of an institutional agency is empowered to act, a majority of that quorum controls, even if that majority includes less than half the authorized strength of the agency.[17] For example, the power of the Securities and Exchange Commission to issue a valid order by divided vote of a three-member

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[17] *E.g., Brown* v. *District of Columbia*, 127 U.S. 579; *Mountain States Tel. & Tel. Co.* v. *People ex rel.*, 68 Colo. 487, 498-500, 190 Pac. 513; *Davidson* v. *State*, 221 N.E. 2d 814 (S.C. Ind.); *State ex rel. Hill* v. *Ponder*, 221 N.C. 58, 62, 19 S.E. 2d 5, 8; *State ex rel. Green* v. *Edmondson*, 23 Ohio Dec. 85, 96; *Bray* v. *Barry*, 91 R.I. 34, 41-42, 160 A. 2d 577, 581. In *E.C. Olsen Co.* v. *State Tax Comm'n*, 109 Utah 563, 571-573, 168 P. 2d 324, the Utah Supreme Court applied this principle in a situation where only two commissioners concurred in rejecting a challenge to a deficiency assessment, even though two others had also been present at the hearing, presuming that the two participating constituted a majority of a quorum.

quorum was recognized in *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 798, 801 (C.A.D.C.) (dictum). The Federal Communications Act provides for a quorum, but does not specify that a majority of a quorum may bind the Commission. Yet, in *WIBC, Inc.* v. *Federal Communications Commission*, 259 F. 2d 941 (C.A.D.C.), the court held that when a quorum is present, the Commission may act by majority vote, stating that such practice is "in accord with the authorities concerning the action of Congress as well as administrative agencies." *Id.* at 943. The Court of Appeals for the District of Columbia Circuit, speaking in the context of a Civil Aeronautics Board vote, has recently expressed the same general rule that "valid agency action depends on the effective concurrence of a majority of the designated quorum." *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, No. 20160, decided April 12, 1967. In *Frischer & Co.* v. *Bakelite Corp.*, 39 F. 2d 247 (C.C.P.A.), certiorari denied, 282 U.S. 852, the court, approving the Tariff Commission's reliance on the majority-of-a-quorum rule, noted that "the trend of modern authority is that in collective bodies other than courts, even though they may exercise judicial authority, a majority of a quorum is sufficient to perform the function of the body." (*Id.* at 255.) In holding that a majority of a quorum may validly act for the administrative body, these courts are applying the well established rule of the common law. As was well said in *Frischer & Co.* v. *Elting*, 60 F. 2d 711, 714-715 (C.A. 2), certiorari denied, 287 U.S.

649: "Any other method of procedure would be awkward, if not impracticable."

Furthermore, the reorganization of the Federal Maritime Commission in 1961 illustrates the simplicity of drafting a requirement that when a bare quorum is acting, the quorum must concur unanimously. Reorganization Plan No. 7 of 1961, 75 Stat. 840, note following 46 U.S.C. 1111, reconstituted the Maritime Commission as a five-member agency. Section 102(d) then proceeded to specify:

> A vacancy in the Commission, so long as there shall be three Commissioners in office, shall not impair the power of the Commission to execute its functions. Any three of the Commissioners in office shall constitute a quorum for the transaction of the business of the Commission *and the affirmative votes of any three Commissioners shall be sufficient for the disposition of any matter which may come before the Commission.* [Emphasis added.]

Thus, after duplicating the "vacancy" provision that appears in most regulatory acts, including Section 1 of the Federal Trade Commission Act, and after authorizing action by quorum, in accordance with most other regulatory acts and the Federal Trade Commission's Rule of Practice in 16 C.F.R. 1.7, the Plan added the unique condition that in the event only three Commissioners participate they must act unanimously. This careful and singular restriction was not inserted in any other Reorganization Plan submitted and approved by Congress in 1961, including Plan No. 4, which, as will be discussed below, in fact

expanded the authority of the Federal Trade Commission to act by less than the full membership.

Two courts of appeals have explicitly held that the Federal Trade Commission may emulate this uniform practice of the other administrative agencies. Both *Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F. 2d 599 (C.A. 6), certiorari denied, 382 U.S. 939, and *LaPeyre* v. *Federal Trade Commission*, 366 F. 2d 117 (C.A. 5), involved cease-and-desist orders issued by two-to-one votes of the Commission, and in both the courts upheld the power to issue such orders, relying principally on the Commission's quorum rule. The court below refused to follow the *Atlantic Refining* decision because, it said, the Sixth Circuit misconstrued the quorum rule itself and erroneously relied on the District of Columbia Circuit's decision in *Drath*, *supra*. It is true that Rule 1.7 does not specifically state that a majority of the designated quorum is sufficient to control; but, as the cases cited in notes 8-10, *supra*, demonstrate, this has been the uniform construction given to other provisions that merely set forth that a majority of an agency constitutes a quorum. And although the *Drath* case did not involve a division within a three-member quorum, the case squarely upholds the validity of the quorum rule; and as the court below itself recognized (R. 50), this is the dominant issue. The Fifth Circuit decided *LaPeyre* with full awareness of the decision now under review, but deliberately declined to follow it. Instead it confirmed the propriety of a two-to-one order, relying on *Atlantic Refining* and *Drath* as authorities worthy of respect. See 366 F. 2d at 122.

In rejecting these precedents, the lower court explained that the dual factors of size and political balance led it to hold that the Commission's practice is invalid. After referring to the experience of the National Labor Relations Board and Interstate Commerce Commission, the court, in its *en banc* amendment of the panel opinion by a five-to-four vote, said:

> On the other hand, it is difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation [R. 61].

The flaw in this argument is that it assumes incorrectly that the Federal Trade Commission is somehow more vulnerable to partisan usurpation than any other agency, when Congress evidently does not harbor any such fear.[18] First, it is notable that all but one of the various major agencies created since the establishment of the Federal Trade Commission are composed of five members[19] and are subject to the identical limitation that no more than a bare major-

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[18] One concern of those opposing Reorganization Plan No. 4 of 1961 was that the chairman's power to delegate Commission functions might be used to circumvent the political balance struck by the Act (see 107 Cong. Rec. 10845). By rejecting the resolutions to disapprove the Plan, Congress was thus rejecting the very policy argument relied upon by the court below.

[19] See 16 U.S.C. 792 (FPC); Reorganization Plan No. 7 of 1961, 75 Stat 840, note following 46 U.S.C. 1111 (FMC); 49 U.S.C. 1321(a) (CAB); 15 U.S.C. 78d(a) (SEC). The FCC is composed of seven members, 47 U.S.C. 154(a).

ity may be of the same political party.[20] Yet Congress permits that same potentially partisan number to constitute a quorum for the transaction of business[21] and with the single exception of the Federal Maritime Commission does not require such quorum to act unanimously. When Congress itself recognizes no incompatibility between a provision for a five member bipartisan agency and the authority to function by majority of a quorum, it is inappropriate for a court to engraft such a limitation in contravention of long-established and unchallenged agency operation.

The court's argument may more persuasively be turned around. As demonstrated by Reorganization Plan No. 7 of 1961 dealing with the Federal Maritime Commission, when an agency is to be limited to acting by the affirmative vote of a majority of its total membership, it is simple enough to say so. Yet neither the President in proposing Reorganization

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[20] See statutes cited in the immediately preceding footnote.

[21] See statutes cited *supra*, note 19. The Securities Exchange Act, however, does not mention a quorum.

The National Labor Relations Board, the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, and the Federal Power Commission do not have published rules that a majority of the authorized quorum controls, but these agencies have advised us that this is the consistent construction they accord their statutory quorum clauses. Furthermore, the Securities and Exchange Commission reports that it has consistently taken the position that it may act by a majority of a quorum, even though its organic statute, like the Federal Trade Commission Act, does not specify a quorum.

Plan No. 4 of 1961, involving the Federal Trade Commission, nor the Congress in acepting it saw any need for such a restriction on this agency.

The policy of preventing a political majority of a bipartisan administrative agency from ignoring the views of the minority members of the other party has been directly protected in another, and more effective, way. The 1961 Reorganization Plans, including the Plan approved for the Federal Trade Commission, in addition to authorizing delegations of agency functions to panels or single commissioners, provided that any such decision or order would be subject to review by the full agency upon the vote of a majority of the agency less one member.[22] As the President explained, this was done to "maintain the fundamental bipartisan concept explicit in the basic statute creating the Commission." [23]. The decision of the Commission involved in this case was not the product of a formal delegation to a separate panel pursuant to the Reorganization Plan, but the device embodied in that Plan does seem to mark the path that the President

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[22] See Plan No. 1, H. Doc. No. 146, 87th Cong., 1st Sess. (1961) (SEC); Plan No. 2, H. Doc. No. 147 (FCC); Plan No. 3, H. Dock. No. 152 (CAB); Plan No. 4, H. Doc. No. 159 (FTC); Plan No. 5, H. Doc. No. 172 (NLRB). Plans Nos. 1, 2 and 5 were disapproved by one House of Congress. Plans Nos. 3 and 4 became effective, see 75 Stat. 837.

[23] See, *e.g.*, H. Doc. No. 159, 87th Cong., 1st Sess. 2 (1961), transmitting the Plan for Reorganizing the Federal Trade Commission. Similar statements appear in the transmittal messages contained in the documents cited *supra*, note 22.

and Congress have taken for preserving the bipartisan nature of regulatory agencies.

On this point, the lesson of the Securities and Exchange Commission is reassuring. Not only does the statute creating that agency prohibit more than three of its five members being of the same political party, but it also directs that "in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable." 15 U.S.C. 78d. Yet despite this sensitivity to political composition and the lack of any statutory reference to a quorum, the five member agency has considered itself capable of acting by a two-to-one vote, and this understanding has received judicial confirmation. See *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 798, 801 (C.A. D.C.), and decisions there cited.

Therefore, we submit, the unbroken line of precedent supports the Federal Trade Commission's quorum rule, as applied in this case; Congress approves of such a rule as the normal mechanism for agency action unless otherwise explicitly provided; and the court below adduced no supportable reason why the Federal Trade Commission should labor under strictures not applicable to other regulatory agencies.

II. Important Considerations of Policy Support the Power of the Commission to Take Action by Majority of a Quorum

The rule that a majority of a quorum may act for an administrative body, unless Congress clearly provides to the contrary, rests upon the important pol-

icy consideration that such a rule is vital to the accomplishment of the purposes for which these bodies are created. It recognizes, and provides for, the frequent occasions when the full membership may not be available and yet important business must be transacted. On the other hand, the decision of the court below would seriously impair the ability of the Federal Trade Commission effectively to perform its statutory functions.

During four periods in its history, there have been two vacancies on the Commission; one of these was for more than seven months. Under the ruling of the court below that Commission action requires the concurrence of three members, the Commission would in many instances be completely unable to act during periods of double vacancy. Single vacancies, of course, have been frequent in the Commission's history, some of them of considerable duration.[24] During any period of single vacancy, the inability of any remaining Commissioner to participate because of illness or disqualification might prevent the Commission from deciding any number of cases.

Although the decision below would permit three Commissioners to act for the Commission if they were unanimous, this is of little aid to an agency seeking to act expeditiously and to keep abreast of a crowded docket. In attempting to decide whether to consider a pending matter with only three members available,

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[24] A list of double vacancies on the Commission, and single vacancies lasting six months or longer, is set forth in Appendix A, *infra*.

the Commission obviously cannot prejudge the case and know in advance of a hearing on the merits whether or not it would achieve the unanimity the ruling below would make requisite for a disposition of the case. Should the three members not agree, the rule of the court below would require a rehearing at some subsequent time before the full Commission. Thus, the danger of waste and duplication of the Commission's efforts is serious. The delay, expense, and frustration incident to such a rule will aggrieve not only the parties involved in cases which must be reheard, but also parties in other cases on the Commission's docket, cases which the Commission would have to hold over to accommodate such rehearings. The incompatibility of such a procedure with sound and efficient administration is a further reason for concluding that the lower court erred in imputing to congressional silence an intention to saddle the Commission with the procedural restrictions imposed by that court's ruling in this case.

Nor are these merely academic speculations. A review of the Commission's docket discloses that, during the six fiscal years 1962 through 1967, there were at least thirty cases in which only three Commissioners participated in finding a violation and issuing an order; in 13 of these cases the decision was by a two-to-one vote, and thus under the decision in this case could not have resulted in a valid order.[25]

The wholly desirable objective of the congressional scheme for the administrative process is the streamlin-

[25] A list of these cases is set forth in Appendix B, *infra*.

ing of procedures in order to maximize the efficiency of the process. As President Kennedy stated, administrative agencies "are not merely regulatory; they are designed to further the expansion of certain facets of our economy, as well as the basic tenets that underlie our system of private enterprise. Delays in the disposition of agency business, and the failure to evolve, other than by a slow case-by-case method, policies essential for our national growth seriously handicap their effectiveness in meeting this function." [26] After stating this critical goal, President Kennedy explained that the manner of achieving the fulfillment of the promise of the administrative process would be "a far wider range of delegations to smaller panels of agency members." [27] It was for this purpose that he submitted the Reorganization Plan expanding the power of the Federal Trade Commission to dispose of cases efficiently by less than the full membership. And Congress accepted this lead. While the Commission was not functioning under an explicit delegation in this case, the ruling of the court below needlessly encumbers the administrative machinery, despite the demonstrable congressional policies to the contrary and in the absence of any sound reason for introducing its anomalous requirement into the law.

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[26] *Message from the President of the United States Relative to the Regulatory Agencies of Our Government*, H. Doc. No. 135, 87th Cong., 1st Sess. 3 (1961).

[27] *Id.* at 6.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to review the merits of the Section 2(c) violation.

Respectfully submitted.

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APPENDIX A

Vacancies on The Federal Trade Commission 1915-1966

Periods of time during which there have been two vacancies on the Federal Trade Commission:

Feb.	1, 1917	through	March	15,	1917
June	1, 1918	"	Jan.	16,	1919
Dec.	1, 1919	"	Jan.	31,	1920
July	1, 1934	"	Aug.	22,	1934

Periods of vacancies on the Commission existing six months or longer:

May	15, 1916	through	March	15,	1917
March	19, 1918	"	March	5,	1920
June	1, 1918	"	Jan.	16,	1919
Sept.	26, 1921	"	June	25,	1922
Sept.	26, 1932	"	May	25,	1933
July	1, 1934	"	Aug.	26,	1935
Jan.	1, 1949	"	Sept.	27,	1949
Oct.	24, 1949	"	Oct.	24,	1950
March	1, 1964	"	Oct.	28,	1964

There have been twenty-eight periods during which there has been at least one vacancy on the Federal Trade Commission.

Vacancies on the Federal Trade Commission 1915-1966

(Seat currently occupied by Chairman Dixon)	Vacant:	April 22, 1917—Sept. 3, 1917 Feb. 1, 1924—June 15, 1924 Sept. 26, 1932—May 25, 1933 Oct. 24, 1949—Oct. 24, 1950 June 1, 1959—June 8, 1959
(Seat currently occupied by Commissioner Elman)	Vacant:	March 19, 1918—March 5, 1920 Sept. 26, 1921—June 25, 1922 Aug. 1, 1926 (single day vacancy) Jan. 16, 1929—Jan. 31, 1929 Aug. 29, 1945—Oct. 14, 1945 Nov. 1, 1956 (single day vacancy) March 2, 1961—April 20, 1961
(Seat currently occupied by Commissioner MacIntyre)	Vacant:	June 1, 1918—Jan. 16, 1919 Sept. 26, 1926—Feb. 10, 1927 Jan. 24, 1933—June 25, 1933 Sept. 26, 1933—Oct. 9, 1933 July 1, 1934—Aug. 22, 1934 Feb. 18, 1952—June 17, 1952
(Seat currently occupied by Commissioner Reilly)	Vacant:	Feb. 1, 1917—March 15, 1917 Sept. 26, 1920—Jan. 14, 1921 Sept. 26, 1927—Nov. 13, 1927 Jan. 7, 1964—Jan. 27, 1964
(Seat currently occupied by Commissioner Jones)	Vacant:	May 15, 1916—March 15, 1917 Dec. 1, 1919—Jan. 31, 1920 Oct. 8, 1933—Oct. 26, 1933 July 1, 1934—Aug. 26, 1935 Jan. 1, 1949—Sept. 27, 1949 March 1, 1964—Oct. 28, 1964

APPENDIX B

Federal Trade Commission Orders Issued by a Panel of 3 Commissioners During Fiscal Years 1962-67

[* Indicates Two-to-One Decision]

Fiscal Year 1962:

1. *Encyclopedia Brittannica, Inc.*, 59 F.T.C. 24.
2. *Helbros Watch Co.*, 59 F.T.C. 1377.

Fiscal Year 1963:

1. *Sacks Woolen Co.*, 61 F.T.C. 1226.

*2. *Luria Bros.*, 62 F.T.C. 243, pending C.A. 3, No. 14,402 and 14 separate related petitions.

*3. *Forster Mfg. Co.*, 62 F.T.C. 852, remanded to Commission, 335 F. 2d 47 (C.A. 1), certiorari denied, 380 U.S. 906, Commission action after remand affirmed, 361 F. 2d 340 (C.A. 1), certiorari denied, 385 U.S. 1003.

4. *National Bakers Services, Inc.*, 62 F.T.C. 1115, affirmed, 329 F. 2d 365 (C.A. 7).

*5. *Borden Co.*, 62 F.T.C. 130, order set aside, 339 F. 2d 133 (C.A. 5), reversed and remanded, 383 U.S. 637, order again set aside, C.A. 5, No. 20463, decided July 14, 1967.

Fiscal Year 1964:

*1. *Atlantic Refining Co.*, Docket 7471, 1961-63 Trade Reg. Rep. Transfer Binder ¶ 16,422, affirmed, 344 F. 2d 599 (C.A. 6), certiorari denied, 382 U.S. 939.

2. *Wilson Chemical Co.*, Docket 8474, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,749.

Fiscal Year 1964:—Continued

3. *Ideal Toy Corp.*, Docket 8530, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,751.

4. *Filderman Corp.*, Docket 7878, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,767.

*5. *State Paint Mfg. Co.*, Docket 8367, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,772.

*6. *Borden Co.*, Docket 7474, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,776, reversed, 339 F. 2d 953 (C.A. 7).

7-8. *Individualized Catalogues, Inc.; Santa's Playthings, Inc.*, Dockets 7971, 8321, 8255, 8259, 4 separate dockets and orders; 2 administrative proceedings; 1 decision, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,873.

9. *ATD Catalogues, Inc.*, Docket 8100, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,874.

10. *Billy & Ruth Promotion, Inc.*, Docket 8240, 1963-65 Trade Reg. Rep. Transfer Binder ¶16,875.

*11. *Purolator Products, Inc.*, Docket 7850, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,877, affirmed, 352 F. 2d 874 (C.A. 7), petition for certiorari pending, No. 7, O.T., 1967.

12. *Ekco Poducts Co.*, Docket 8122, 1963-65 Trade Reg. Rep. Transfer Binder ¶ 16,879, affirmed, 347 F. 2d 745 (C.A. 7).

13. *Continental Products, Inc.*, Docket 8517, 1963-1965 Trade Reg. Rep. Transfer Binder ¶ 16,883.

14. *Permanente Cement Co.*, Docket 7939, 1963-1965 Trade Reg. Rep. Transfer Binder ¶16,885.

Fiscal Year 1964:—Continued

*15. *Pacific Molasses Co. & Bascom Doyle*, Docket 7462, 1963-1965 Trade Reg. Rep. Transfer Binder ¶ 16,916, reversed, 356 F. 2d 381 and 386 (C.A. 5) (separate petitions to review one order).

*16. *Grand Caillou Packing Co.*, Docket 7887, 1963-1965 Trade Reg. Rep. Transfer Binder ¶ 16,927, affirmed in part and reversed in part *sub nom. LaPeyre* v. *Federal Trade Commission*, 366 F. 2d 117 (C.A. 5).

Fiscal Year 1965:

*1. *Flotill Products, Inc.*, Docket 7226—instant case.

2. *Inland Container Corp.*, Docket 7993, 1963-1965 Trade Reg. Rep. Transfer Binder ¶ 17,012.

*3. *Dayco Corp.*, Docket 7604, 1963-1965 Trade Reg. Rep. Transfer Binder ¶ 17,029, affirmed in part and reversed in part, 362 F. 2d 180 (C.A. 6).

*4. *Bakers of Washington, Inc.*, Docket 8309, 1963-1965 Trade Reg. Rep. Transfer Binder ¶ 17,147, affirmed *sub nom. Safeway Stores, Inc.* v. *Federal Trade Commission*, 366 F. 2d 795 (C.A. 9), certiorari denied, 386 U.S. 932.

5. *Beatrice Foods Co.*, Docket 6653, 1965-67 Trade Reg. Rep. Transfer Binder ¶ 17,244.

Fiscal Year 1966:

1. *Lloyd A. Fry Roofing Co.*, Docket 7908, 1965-67 Trade Reg. Rep. Transfer Binder ¶ 17,303, affirmed, 371 F. 2d 277 (C.A. 7).

2. *B. F. Goodrich Co.*, Docket 6485, 1965-67 Trade Reg. Rep. Transfer Binder ¶ 17,424, pending C.A.D.C., Nos. 20,058 and 20,061.

Fiscal Year 1967:

*1. *National Dairy Products Corp.*, Docket 7018, 1965-67 Trade Reg. Rep. Transfer Binder ¶ 17,656, pending, C.A. 7, No. 15,896.

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